Supreme Court, U.S.
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No. 07-545

In The Supreme Court of the United States

VAN ELK, LTD., and
MORILLO CONSTRUCTION, INC.,

Petitioners,

v.

JOSE REYES, FRANCISCO REYES,
JOSE PEREZ, and CARLOS FLORES,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should review the California District Court of Appeal's decision that the California statute allowing undocumented workers to recover unpaid prevailing wages for work already performed is not preempted by federal immigration law, where the appellate court conscientiously and correctly applied the preemption tests established by this Court's precedents and where that decision is consistent with the rulings of all other courts to consider similar questions.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR DENYING THE PETITION

Respondents request that the Court deny the petition and leave in place the decision of the California Appellate Court. The decision below should be left undisturbed because the California statute providing that all employees, regardless of immigration status, may recover unpaid prevailing wages for work already performed is lawful and should be effectuated. It is well settled that federal immigration law does not preempt state remedies to ensure that all workers can recover unpaid prevailing wages or other statutory minimum wages for work already performed and there is no conflict between decisions of other circuits or the state courts of last resort on this issue.

I. The Appellate Court's Decision that Respondents' Claims are Not Preempted Is Not in Conflict with Other Courts

Petitioners do not argue that the appellate court's decision is contrary to decisions of other state or federal courts that have considered the issue – nor could they. Petitioners cannot point to a single case that finds claims for prevailing wages – or other statutory minimum wages – for work already performed are preempted by federal immigration law. Instead, the clear consensus among state and federal courts that have considered the issue is that such claims are not preempted. As such, this issue is not

ripe for Supreme Court consideration. *See* Sup. Ct. R. 10.

At least one other state court has determined that undocumented immigrants' claims for unpaid prevailing wages are not federally preempted. *Pineda v. Kel-Tech Const., Inc.*, 832 N.Y.S.2d 386, 392-93 (N.Y. Sup. Ct. 2007). In addition, federal case law both before and after this Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) makes clear that courts may award unpaid wages to undocumented workers for work already performed under the Fair Labor Standards Act (FLSA). *See* 29 U.S.C. § 201 et seq. Following the 1986 enactment of the federal Immigration Reform and Control Act (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, but prior to this Court's *Hoffman* decision, federal circuit courts uniformly held that IRCA's passage did not bar undocumented workers from seeking remedies under the FLSA, including claims for unpaid wages. *See Patel v. Quality Inn South*, 846 F.2d 700, 706 (11th Cir. 1988), *cert. denied*, 489 U.S. 1101 (1989) (holding that undocumented immigrants are entitled to the FLSA's protections against minimum wage and overtime violations); *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987), *cert. denied*, 487 U.S. 1235 (1988) ("[I]t is well established that the protections of the [FLSA] are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant."); *see also Mester Mfg. Co. v. INS*, 879 F.2d 561, 567 (9th Cir. 1989) (noting that the IRCA did not repeal the FLSA's coverage of

undocumented workers) (citation omitted); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1056 (N.D. Cal. 1998) ("There is no question that the protections provided by the FLSA apply to undocumented aliens."). In so holding, these courts stressed that allowing undocumented workers to recover wages for work performed, but not paid, furthers the IRCA's federal policy goals of reducing unauthorized work. *See, e.g., Patel,* 846 F.2d at 704 ("If the FLSA did not cover undocumented aliens, employers would have an *incentive* to hire them."). This Court's decision in *Hoffman* does nothing to alter this line of cases.

Since *Hoffman*, numerous federal courts have considered whether immigration status is relevant to claims for unpaid wages under the FLSA. These federal cases are analogous to the case before the Court for several reasons. First, California wage and hour law provides at least equivalent protection to workers as the FLSA. *See, e.g., Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 592 (2002) (noting the "recognized principle" that state wage and hour law may provide greater protection than the FLSA); *see also* 29 U.S.C. § 218(a) (allowing states and municipalities to enact more generous minimum wage laws than provided under the FLSA). Second, for construction workers on public projects costing over $1,000 California's prevailing wage law is the relevant state minimum wage. *See* Cal. Labor Code § 1771. There is no conceptual distinction between workers' claims for unpaid minimum wages under the FLSA and the

plaintiffs' claims here for unpaid prevailing wages under the California statute that is the minimum wage for the construction work they performed.

Every federal court that has considered the issue has held that *Hoffman* does not bar payment of unpaid wages to undocumented workers for work already performed under the FLSA and relevant state laws. *See, e.g., Chellen v. John Pickle Co., Inc.*, 434 F. Supp. 2d 1069, 1098 (N.D. Okla. 2006); *Flores v. Limehouse*, No. 2:04-1295-CWH, 2006 WL 1328762, at *2 (D. S.C. May 11, 2006); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501 (W.D. Mich. 2005); *Singh v. Jutla, et al.*, 214 F. Supp. 2d 1056, 1060 (N.D. Cal. 2002); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 322 (D. N.J. 2005); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002); *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002); *Cortez v. Medina's Landscaping*, No. 00-C6320, 2002 WL 31175471, at *1 (N.D. Ill. Sept. 30, 2002); *Flores v. Albertsons, Inc.*, No. CV0100515AHM (SHx), 2002 WL 1163623, at *5 (C.D. Cal. Apr. 2, 2002); *see also Cabrera v. Ekema*, 265 Mich. App. 402, 408-11 (Mich. Ct. App. 2005). Each of these cases emphasizes that *Hoffman* held that undocumented workers were not entitled to *post-termination* backpay under the National Labor Relations Act (NLRA) because awarding such a remedy is premised on the workers' eligibility to work in the future, which requires a court to put a stamp of approval on continued unauthorized work. *See Hoffman*, 535 U.S. at 149-50; *see also* NLRA, 29 U.S.C.

§ 151 et seq. In contrast, there is no such inherent conflict in the award of damages for work already performed.

The FLSA sets the federal minimum wage and allows states to create more protective wage and hour laws. California has done so. In California, construction workers on public projects costing over $1,000 are entitled to pay at the prevailing wage rate. Cal. Lab. Code §§ 1720, 1770, 1771. Under California labor and employment laws, as under the FLSA, undocumented workers are covered employees and their immigration status is irrelevant to the issue of an employer's liability. Cal. Lab. Code § 1171.5(b). Under state law, immigration status is only relevant if undocumented workers seek a reinstatement remedy, which is prohibited by federal law. Cal. Lab. Code § 1171.5(a). But, plaintiffs here do not seek reinstatement; they simply seek payment for prior work they have already performed. There is, therefore, no reason to treat an undocumented worker's claim for unpaid wages under California's prevailing wage law any differently than an undocumented worker's claim to collect unpaid wages under the FLSA.

Reversing the appellate court's decision would not only frustrate federal immigration law, but would also undermine state employment law and the labor rights of all workers – immigrants and native-born alike. The federal immigration policy concerns central to the *Hoffman* decision are not implicated by this appeal. In *Hoffman*, this Court held that the National

Labor Relations Board (NLRB) was prohibited from awarding backpay to undocumented immigrants because such an award "runs counter to policies underlying IRCA." *Hoffman,* 535 U.S. at 149. However, an entirely different set of equities must be considered in cases like the instant appeal where undocumented workers seek unpaid wages for work already performed. In such cases there is no threat that awarding damages would conflict with federal immigration policy by condoning future unauthorized work. Instead, such awards simply make clear that employers should not be allowed to profit from employing undocumented workers and then exploiting them in order to get free labor. For this reason, this case has ramifications far beyond the four plaintiffs' claims. If undocumented workers could not sue to enforce their statutory rights to pay for work performed, employers would actually have an incentive to hire such laborers, which would undermine federal immigration policy as articulated by the IRCA. *See Patel,* 846 F.2d at 704 ("If the FLSA did not cover undocumented aliens, employers would have an *incentive* to hire them."); *Singh*, 214 F. Supp. 2d at 1061-62 (N.D. Cal. 2002) (noting that the FLSA "discourages employers from hiring [unauthorized] workers because it eliminates employers' ability to pay them less than minimum wage or otherwise take advantage of their status").

In addition, allowing employers to avoid liability for prevailing wages for work performed undermines labor and employment law and creates "a perverse incentive [for employers] to ignore immigration laws

at the time of hiring but insist upon their enforcement when their employees complain." *Rivera, et al. v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004), *cert. denied*, 544 U.S. 905 (2005) As courts have noted, some unscrupulous employers seek out undocumented workers in order to gain economic advantage by employing cheap labor and reducing the likelihood that workers will report them for violations of statutory rights. *See id.*; *Flores v. Amigon,* 233 F. Supp. 2d at 464. There can be no doubt that requiring employers to pay undocumented workers at the same rate as documented workers furthers, rather than frustrates, federal immigration policy as well as labor and employment law. *See also Singh,* 214 F. Supp. 2d at 1062; *Flores v. Amigon*, 233 F. Supp. 2d at 464; *Patel*, 846 F.2d at 704.

II. The Appellate Court Correctly Applied this Court's Precedents on Preemption to Respondents' Claims for Unpaid, Prevailing Wages

A. This Court's Decision in *Hoffman* Does not Preclude Undocumented Workers from Recovering Prevailing Wages for Work Already Performed

The linchpin of the petition is the assertion that the "legal anatomy" of a prevailing wage claim for work already performed so closely resembles a claim for backpay for work *not performed* under the NLRA that this Court's ruling in *Hoffman* must preclude recovery. This is incorrect and would constitute a

sweeping expansion of the Court's *Hoffman* decision. First, the *Hoffman* decision explicitly reaffirms the portion of the Court's earlier decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 833, 892 (1984) holding that undocumented immigrants continue to be covered by the "employee" definition under the NLRA and therefore have standing to enforce violations of the Act.

This Court's decision in *Hoffman* only precluded undocumented workers from recovering a single remedy, post-termination backpay, under a single federal statute, the NLRA. Post-termination backpay is compensation for the wages a worker would have earned in the future but for the employer's illegal firing. In reaching its decision in *Hoffman* this Court noted that such backpay awards inherently require the NLRB to approve of future unauthorized work despite the restrictions on such employment in the IRCA. Nothing in *Hoffman* limits courts' ability to award unpaid prevailing wages to undocumented workers for work already performed, which unlike the award of post-termination backpay, does not require courts to put a stamp of approval on future, unauthorized work, but instead keeps employers from unjustly benefiting from the work already carried out by its employees.

In addition, this Court's decision in *Hoffman* turned, to a great extent, on the nature and purposes of the NLRA as well as the NLRB's limited ability to order remedies for violations of the Act. Thus, the decision is inherently limited to the NLRA. Nonetheless, in *Hoffman* this Court made clear that other

remedies remained available to undocumented workers whose NLRA rights were violated. *Hoffman*, 535 U.S. at 152 (finding that the NLRB was free to impose other sanctions for the employer's violation of the NLRA). Finally, this case is not the proper vehicle to consider whether the Court's *Hoffman* decision should be extended to bar other federal or state remedies that may require courts to deny a remedy because it is akin to backpay under the NLRA or because such remedies frustrate the objectives of federal immigration law. This case simply does not present those questions.

Petitioners try unsuccessfully to distinguish California's prevailing wage statute from other statutory minimum wage laws in order to avoid the strong weight of authority – both before and after *Hoffman* – establishing that undocumented workers are entitled to recover wages for work already performed. This argument is without merit – California's prevailing wage law is, in all respects, a minimum wage law. *Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.*, 102 Cal. App. 4th 765, 770 (2004) (concluding that the California "prevailing wage is a minimum wage"). Petitioners claim that the mere fact that California's prevailing wage law may be enforced administratively provides "the essential link" between this Court's *Hoffman* decision and the instant case because administrative enforcement provides a deterrent for employers who violate the state's prevailing wage law. Pet. 14. Therefore, according to petitioners, denying the remedy of recovery

of unpaid prevailing wages for work already performed is no different than denying the remedy of post-termination backpay under the NLRA. *Id.* at 14-15. As an initial matter, petitioners misconstrue the Court's rationale for denying post-termination backpay to undocumented workers while leaving intact other NLRA remedies – namely that awarding backpay condones future unauthorized work.

In addition, petitioners' statements about the administrative enforcement of California's prevailing wage law are misleading or inaccurate in several respects. First, petitioners incorrectly indicate that the administrative enforcement of California's prevailing wage law sets it apart from the state minimum wage law. On the contrary, an administrative enforcement scheme also exists for state minimum wage law violations. Second, petitioners ignore the strong evidence that the administrative enforcement regime for prevailing wages is insufficient to deter employer violations. To remedy the inadequacy of administrative enforcement, the California Legislature enacted the Labor Code Private Attorney General Act of 2004 to allow aggrieved employees to act as private attorneys general and to seek civil penalties for labor code violations, including prevailing wage violations, which previously could only be assessed by state agencies. Cal. Labor Code § 2698 et seq.; § 2699.5 (including a private right of action to enforce California's prevailing wage law under the Private Attorney General Act). In passing the Act, the Legislature made the following findings:

(a) Adequate financing of essential labor law enforcement functions is necessary to achieve maximum compliance with state labor laws in the underground economy and to ensure an effective disincentive for employers to engage in unlawful and anticompetitive business practices.

(b) Although innovative labor law education programs and self-policing efforts by industry watchdog groups may have some success in educating some employers about their obligations under state labor laws, in other cases the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties as provided in the Labor Code.

(c) *Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future.*

(d) *It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general*, while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.

2003 Cal. Stat. ch. 906, § 1 (emphasis added). For each of these reasons, petitioners' attempt to distinguish

prevailing wages from other statutory minimum wages is unconvincing, and therefore, petitioner's assertion that the "legal anatomy" of respondents' claims for unpaid prevailing wages is analogous to that of the post-termination backpay at issue in *Hoffman* also fails.

B. California Labor Code § 1171.5 is not Conflict Preempted by Federal Immigration Law

Federal immigration law does not preempt California Labor Code § 1171.5, which provides that workers are entitled to full protection of the state labor law for the purposes of enforcing labor standards, including collecting unpaid wages for work already performed, regardless of immigration status. This provision of the California Labor Code was enacted as a part of a state statute passed following the Court's *Hoffman* decision and was designed to clarify that *Hoffman* did not alter existing state laws providing remedies to all employees, regardless of immigration status. Despite the fact that it is "never assumed lightly that Congress has derogated state regulation," *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654 (1995), the petitioners ask this Court to find that California's prevailing wage statute violates the Supremacy clause and is federally preempted. Pet. 9; *see* U.S. Const., art. VI, § 2, cl. 2. The presumption against federal preemption is especially strong when the state statute at issue falls within the

state's historic police powers. *See De Canas v. Bica*, 424 U.S. 351, 356-57 (1976) (refusing to presume that Congress intended to oust state's broad authority to regulate the employment relationship). Like workers' compensation, minimum wage and other labor laws, such as prevailing wages, fall within the state's historic police powers. *See Farmer Bros. Coffee v. Workers' Compensation Appeals Board*, 133 Cal. App. 4th 533, 538-39 (quoting *De Canas*, 424 U.S. at 356-57) (2005). In such a case, state law cannot be pre-empted by a federal act unless such intent is express in the federal act in question, or reasonably inferred from the existence of an actual conflict between the state and federal laws or the federal law's thorough occupation of the legislative field. *Id.* at 539.

The Supremacy Clause "may entail preemption of state law either by express provision, by implication, or by a conflict between federal and state law." *New York State Conf. of Blue Cross & Blue Shield Plans*, 514 U.S. at 654. The petitioners only assert that California's Labor Code is conflict preempted. But there is nothing in the IRCA indicating a congressional intent to preempt by implication state regulation of state wage and hour law, including prevailing wages, or the damages that may be recovered in a civil action under similar state or federal minimum wage laws.[1] To the contrary, in the IRCA Congress

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[1] Petitioners make no argument that the IRCA expressly preempts state wage and hour law, such as California's prevailing wage statute, nor could they. The only express preemption

(Continued on following page)

authorized funds to bolster the ability for undocumented immigrants to enforce federal minimum wage law under the FLSA.[2] *Patel*, 846 F.2d at 704 (noting that these additional funds were necessary "in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens"). In addition, IRCA's legislative history shows that the Act was not "to undermine or diminish in any way labor protections in existing law." H.R. Rep. No. 99-682, *reprinted in* 1986 U.S.C.C.A.N. 5662. For these reasons, it cannot be argued that California prevailing wage law is implicitly preempted by a federal desire to occupy the field of wage and hour law. Furthermore, allowing undocumented workers to recover the statutorily required prevailing wages for work already performed does not conflict with or erode the IRCA's objectives in a manner sufficient to override the strong presumption against preemption. Instead, as discussed, enforcing prevailing wage law actually fosters the

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provision in the IRCA is the prohibition on state and local employer sanction laws that impose criminal and civil sanctions for employers who knowingly hire unauthorized workers. 8 U.S.C. § 1324a(h)(2).

[2] Section 111(d) of the IRCA states in pertinent part, "[t]here are authorized to be appropriated . . . such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens. Pub. L. No. 99-603, § 111(d), 100 Stat. 3359, 3381 (1986).

IRCA's objectives by eliminating an incentive for unscrupulous employers to hire undocumented workers. Petitioners provide no authority for the proposition that California Labor Code § 1171.5 is conflict preempted. Instead, they simply assert that "Congress has determined that a worker's eligibility to collect prevailing wages *depends upon* that worker's immigration status." Pet. 17. But, the petition fails to point out any Congressional statute, act, or even report standing for this proposition. For these reasons, the appellate court below correctly concluded that neither *Hoffman* nor the IRCA preempts California Labor Code § 1171.5 for the purpose of allowing all workers, irrespective of their immigration status, to recover prevailing wages for work already performed.

CONCLUSION

Because this case is narrowly tied to its particular facts and presents no issue warranting review by this Court, the petition for writ of certiorari should be denied.

Dated: December, 2007

Respectfully submitted,

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